



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF

CECC-ZA

February 11, 2013

MEMORANDUM FOR MANAGING COUNSELS, DIVISION COUNSELS, AND  
DISTRICT COUNSELS

SUBJECT: The Role of Counsel in the SMART Planning Process

1. REFERENCES

a. Deputy Commanding General for Civil Works and Operations (CECW-CP) memorandum for Major Subordinate Commands, dated 8 February 2012, subject: U.S. Army Corps of Engineers Civil Works Study Program Execution and Delivery.

b. CECW-P guidance, SMART Planning Guide, Planning Community Tool Box, 30 June 2012.

2. On 8 February 2012, DCG-CEO directed implementation of a new process— SMART Planning—for conducting civil works feasibility studies.<sup>1</sup> This memorandum provides additional guidance to Managing Counsels, Division Counsels, and District Counsels on their roles in the SMART Planning process.<sup>2</sup>

3. As stated in the DCG-CEO's memorandum, the SMART Planning process is intended to improve and streamline feasibility studies, reduce their cost, and expedite completion. The goal is to complete feasibility studies within three years, at a cost of no more than \$3 million, and with three levels of USACE engaged throughout. Any feasibility study with a Chief's Report scheduled after December 2014 and scoped for greater than three years completion or for more than \$3 million requires a Senior Leader's panel review and DCG-CEO approval to proceed. The Senior Leaders Panel that will consider requests for exemptions from the 3x3x3 rule and make recommendations to the DCG-CEO includes Headquarters, U.S. Army Corps of Engineers (HQUSACE) Chiefs of Planning and Policy Division, Engineering and Construction, Real Estate, and Civil Works Program Integration Division. Pursuant to the DCG-CEO's memorandum, CECW-P has issued further guidance on the new study process which details changes to the study related responsibilities of Corps Headquarters (HQUSACE), Major Subordinate Commands (MSCs), and Districts. These changes are intended to make better use of appropriate Corps personnel and resources, in order to more efficiently advance studies toward favorable agency leadership recommendations of projects for authorization to Congress.

<sup>1</sup> See SMART Planning Guide (online at <http://planning.usace.army.mil/toolbox/smart.cfm>) (hereinafter "SMART Planning Guide").

<sup>2</sup> This memorandum provides internal guidance only, and does not create any mandatory duty or substantive or procedural right enforceable at law by any party in any matter.

4. Together, DCG-CEO's memorandum and CECW-P's guidance give MSC and District Commanders increased responsibility and accountability for executing the new study process, as well as for ensuring vertical team coordination and agreement on each study's progress and continued advancement.<sup>3</sup> While feasibility studies will continue to follow the traditional six-step planning process, these studies now will utilize risk-informed and decision-focused methodologies, and work through a modified series of decision points or milestones: (1) the Alternatives Milestone, requiring vertical team agreement on a study's objectives as well as the range of plan alternatives and criteria for their comparison, (2) the Tentatively Selected Plan (TSP) Milestone, requiring vertical team agreement on the TSP to be published in the District's release of the draft feasibility report for review by the public, as well as formal review of the report by HQUSACE, Agency Technical Review, and Independent External Peer Review if required, (3) the Agency Decision Milestone, requiring approval by the DCG-CEO of the agency recommended plan to receive increased engineering and cost detail to complete the feasibility study report, (4) the Final Report Milestone, requiring DCG-CEO approval of the final report for transmittal for state and agency review, and a Civil Works Review Board, and (5) the Chief's Report milestone, in which a Chief's Report is prepared for signature and ultimately a Record of Decision after Administration Review.<sup>4</sup> These new milestones are intended to confirm increasing degrees of detail for a study, and are to be met through the development of consensus among District, MSC, and HQUSACE planning team members. Corps studies traditionally have advanced through required decision points by completing documentary reviews involving the submission by Districts of draft feasibility report materials, review of those materials by MSC and HQUSACE staff, and the detailed exchange of written comments and responses. In an attempt to avoid or minimize the time and expense of these documentary reviews, the new study process requires milestones to be met as much as possible through in-progress review meetings involving key members of the vertical team. While Districts are required submit read-ahead materials prior to meetings, these materials are not to be submitted for review, but rather to inform and assist the vertical team in discussing and reaching consensus on the next steps for advancing the study.<sup>5</sup>

<sup>3</sup> Reference 1a, para. 2, ("Although transforming the Civil Works program is a responsibility of the functional elements, the MSC Commanders have the ultimate responsibility and accountability for accomplishing the proposed improvements."); *SMART Planning Guide*, in "Modernizing the Corps Feasibility Process" ("Districts will be responsible for executing studies and district staff will form the heart of the Project Delivery Team. However, a coordinated USACE District, Division, and Headquarters Vertical Team will be deployed throughout the project development process in a One-Corps approach to identify and resolve policy, technical, and legal issues early in the process.").

<sup>4</sup> See CECW-P guidance, Planning Bulletin 2012-02: SMART Planning Guide, 31 May 2012 (posted in *SMART Planning Guide*, at "Additional Directives and Guidance"); see also *SMART Planning Guide*, at Alternatives Milestone, "Tentatively Selected Plan Milestone," "Agency Decision Milestone," "Final Report Milestone," and "Chief's Report Milestone." Note that these milestones are intended to serve in lieu of previous study milestones such as feasibility scoping meetings and alternative formulation briefings.

<sup>5</sup> See *SMART Planning Guide*, at "Alternatives Milestone" ("These products . . . will be carried forward to each Milestone meeting, as the background materials that allow the PDT and Vertical Team to understand the story of the study and make the next decision."); "Tentatively Selected Plan Milestone" ("Note that read-ahead submissions are not being submitted for review; they are being submitted to inform the discussions and decisions at the milestone meeting").

5. For some time, my office has expected and Corps regulations have required Division Counsels and District Counsels to play significant roles in developing and conducting civil works feasibility studies.<sup>6</sup> The new planning process requires even greater field counsel involvement in studies at all stages. DCG-CEO's memorandum assigns ultimate accountability for improvements to the study process to MSCs, and CECW-P's guidance assigns increased responsibility to Districts for carrying out studies. At the District level, this includes greater authority and independence for preparing reports, meeting key milestones, developing consensus, establishing criteria for evaluating alternatives, and selecting a recommended plan.<sup>7</sup> Districts are expected to achieve milestones using interim progress reviews performed by study teams. Of particular note, preliminary review by HQUSACE of draft feasibility reports is no longer required. Instead, submittal to HQUSACE for formal review is not required until the report has been released by a District for public review.<sup>8</sup>

6. CECW-P guidance for the new planning process details several key functions to be performed by Division Counsels and District Counsels, including a requirement to assign counsel representatives to project development teams upon study initiation.<sup>9</sup> The guidance also requires that counsel be engaged and initiate legal review early in the study process, so that legal issues can be identified, addressed promptly, and elevated if necessary. District Counsels must review draft feasibility reports for legal sufficiency prior to public release, and must also review final feasibility reports.<sup>10</sup>

<sup>6</sup> See ER 1165-2-502, paras. 7-8 ("The transmittal documentation will include . . . the District Counsel's legal written certification that the report is legally sufficient"); ER 1105-2-100 Appendix H, paras. H-1-page H-2; EC 1165-2-209, para. 14; see also ER 5-1-11, App. A; PMBP SOP, Office of the Chief Counsel (6 Apr 01); Enterprise Standard (ES) 170008, Legal Review of Decision Documents; Chief Counsel Memorandum to Division and District Counsels, Subject: Legal Review of Civil Works Project Decision Documents), 26 April 1996.

<sup>7</sup> See DCG-CEO memo and CECW-P guidance, quoted at note 2.

<sup>8</sup> See prior discussion of Alternatives Milestone and TSP Milestone, at note 3; see also *SMART Planning Guide*, at "Tentatively Selected Plan Milestone" ("Following the TSP Milestone, the Chief of Office of Water Project Review determines if the analyses and findings to date are sufficient to approve release of a draft report and NEPA document for *concurrent public and policy review*, ATR, and, if required, IEPR"); *SMART Planning Guide Review Primer*, May 31, 2012 (posted in *SMART Planning Guide* at "Tips, Tools, and Techniques: Review Primer") (Hereinafter "*Review Primer*"), at para. 3.b. ("Tentatively Selected Plan Milestone - The Vertical Team and Project Delivery Team agree on the plan that will be published as the Tentatively Selected Plan for public review. *Concurrent public, technical, policy, and legal reviews will occur.*") (emphasis added).

<sup>9</sup> *Review Primer*, para. 5.a. at p. 13.

<sup>10</sup> *Review Primer*, para. 2.b at p. 5 ("Legal review begins early in the study process so that issues are identified and addressed promptly, with elevation to higher authority as appropriate. These reviews ensure compliance of the investigations, reports, and recommendations with laws that govern the development of water resources solutions, including environmental laws such as NEPA; project specific and general provisions from WRDAs, River and Harbor Acts, and/or Flood Control Acts; and adherence to study resolutions, among others. PDT's are encouraged to seek legal counsel during project development. Legal certification by District Counsel is required prior to release of the draft decision document for public review, and legal review must continue as the final report is developed, with specific focus on changes in the decision document. All final decision documents must be legally certified and final legal compliance reviews are performed by HQUSACE unless this responsibility has been delegated. Guidance for legal compliance reviews is addressed in Appendix H, ER 1105-2-100.")

7. Under the SMART Planning process, District Counsels are responsible for documenting their office's legal review, including providing concurrence or discussion of legal issues, for all written study materials prepared for planning milestone meetings by District offices prior to their submittal to MSCs or HQUSACE. District Counsels also should provide discussion of any significant policy risks or concerns relevant to Corps decision makers.<sup>11</sup> As also required by the new planning process, District Counsels shall certify the legal sufficiency of draft feasibility reports to be released for public, HQUSACE, and other needed reviews. District Counsels retain their responsibilities for certifying draft feasibility reports as legally sufficient prior to transmitting the draft feasibility report for state and agency review, as well as for certifying final feasibility reports as legally sufficient to support a final agency recommendation and submission of a plan to Congress for authorization for construction. District Counsels shall ensure that legal reviews provide a thorough analysis of all relevant issues of law and policy, and that such reviews clearly express an opinion as to the legal sufficiency of reports. CECW-P's guidance accurately notes a range of issues relevant to legal review of Corps studies, including review to "ensure compliance of the investigations, reports, and recommendations with laws that govern the development of water resources solutions, including environmental laws such as NEPA; project specific and general provisions from WRDAs, River and Harbor Acts, and/or Flood Control Acts; and adherence to study resolutions, among others."<sup>12</sup> With any study, legal review should ensure that written study materials, prior to their submission to higher level authority, adequately address or raise concerns regarding any significant legal issues. Legal issues relevant to a study or study report will depend on many factors, including the particular study authority, the stage of the study when review occurs, and the particular facts applicable to the study. Nonetheless, certain issues generally warrant consideration regardless of these factors.

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<sup>11</sup> As reflected in the new planning process guidance, District written materials required for planning milestones under the new study process can include but are not limited to briefing materials, report summaries, decision management plans, and risk registries, draft feasibility reports or other decision documents, and other study related materials. These materials will increase in detail as the study advances to each successive milestone. This is particularly true for the report summary as it develops into the feasibility report. See *SMART Planning Guide*, "Alternatives Milestone". Aside from the report summary, risk registers also are documents likely to require particular attention from counsel offices. Under the SMART Planning process, the importance of and corresponding detail required for these documents has grown. Indeed, CECW-P guidance makes clear that risk registries are an integral part of the SMART Planning process, and that risk registries are to be available to outside stakeholders. See *SMART Planning Guide*, "Tips, Tools, and Techniques," ("the risk register is a valuable tool to communicate risk management issues to the PDT, the Sponsor, the USACE Vertical Team and key stakeholders."). The risk register is intended to assess each risk to the study, including the risk's cause, consequence, evidence for consequence, risk management options, and risk management recommendations. Given the availability of risk registries to outside stakeholders, either through a FOIA request or as part of stakeholder's participation in a study, these documents present the potential for disclosure of information that could become relevant in litigation. Counsel offices should be attuned to reviewing and recommending appropriate edits, deletions, or additional narrative context for statements regarding litigation or lawsuit risk. For example, risk registries should avoid statements that might be characterized as assessing a possible or likely legal result, given that parties adverse to the Corps can be expected to use information in risk registries in litigation, including as a basis for asserting an admission of a study or study report's inadequacy or lack of compliance with applicable laws or regulations.

<sup>12</sup> *Review Primer*, para. 2.b on page 5.

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These include but are not limited to (1) the need to fully explain the statutory authority for a study and how the study's activities comport with that authority, and (2) the non-Federal interest's financial and other obligations for the study as well as for implementation of the tentatively identified or recommended plan. District Counsels are responsible for identifying and addressing legal issues as soon as possible, including elevating issues to higher authority as appropriate.

8. Division Counsels are responsible under the SMART Planning process for advising MSC Commanders whether civil works feasibility studies comply with all relevant legal requirements, as well as documenting their offices' legal review (including providing concurrence or discussion of legal issues) of any study materials submitted for MSC approval. Division Counsels should also provide discussion of any significant policy risks or concerns relevant to Corps decision makers. Similarly, Division Counsels are responsible for documenting such review of any District study materials prepared for a planning milestone prior to their submittal to HQUSACE. Division Counsels also remain responsible, as part of their management responsibilities, for ensuring that District Counsels carry out their duties related to implementation of feasibility studies.

9. HQUSACE Counsel, including Managing Counsels and staff attorneys in the Legislation, Fiscal, and General Law Practice Group, Real Estate Practice Group, Environmental and Regulatory Law Practice Group, and other CECC practice groups as appropriate, are responsible for providing final agency legal review, concurrence, and concerns regarding all study materials submitted to HQUSACE for review, as well as for providing final legal review for the Corps regarding the legal sufficiency of draft feasibility reports to be submitted for state and agency review, and of final reports intended to support the agency's recommendation of a plan for transmission to Congress for authorization.

10. District, Division and HQUSACE Counsels should avoid carrying out their review responsibilities in isolation. Instead, all offices should endeavor to provide legal services in as collaborative a manner as possible, with active and engaged consultation and coordination occurring at all levels. In a collaborative approach, legal issues are resolved by consensus before a study leaves the District level. Although legal or other issues can arise after a study leaves the District or Division, our goal should be to make that occurrence as rare as possible. Attorneys should strive to resolve issues early and with the involvement of appropriate higher levels, consistent with our ethical obligation as attorneys to represent the legal interests of the Army.

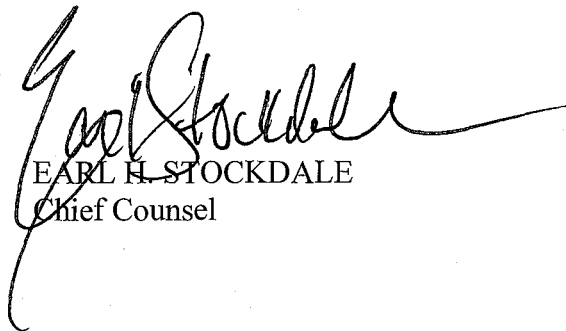
11. In implementing this guidance, District, Division, and HQUSACE Counsels should engage with appropriate client offices regarding the SMART Planning process and the necessary and important role in the process that counsel offices will play. CECW-P's guidance makes this key role of counsel quite clear. As attorneys, we can help emphasize that message by ensuring our clients are informed about the SMART Planning process and how we can help them successfully implement studies in accordance with that process. I also am copying the Director of Civil Works on this guidance, and have asked his assistance in emphasizing to Corps planning and project management offices of the

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importance of providing our attorneys sufficient time and opportunity for review to ensure that studies comply with applicable legal and policy requirements. The deadlines and other heightened standards imposed by the SMART Planning process are ambitious, and are likely to challenge HQUSACE, Division, and District Offices in performing adequate legal reviews. These challenges can be mitigated best through advising our clients of the risks involved with the process, improving the process itself where possible, and developing working relationships that allow us to work early and often with clients on studies, to help implement them efficiently, at minimum cost, and above all in a legally sufficient manner.

12. My point of contact on this memorandum is N. Scott Murphy, Senior Counsel for Project Agreements and Reports, (202) 761-7116.



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